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No. 440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

THE UNITED STATES, *Petitioner*,

vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Claims.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

I.

Only Property of the United States is Entitled to Transportation at Land-Grant Rates. That United States Pays for Transportation of Army Officers' Personal Property and is Interested in Having Same Transported, is Insufficient to Entitle Government to Land-Grant Rates.

For the purposes of the hearing of this case, respondent has filed additional copies of its brief in opposition to the petition for a writ of certiorari.

In said brief respondent discusses the railroad land-grant statutes and the decisions of the Court of Claims and of this court with respect to the status of the private property of Army officers transported by the United States upon Government bills of lading at its own expense on change of station of such officers.

It appears from said statutes and decisions that land-grant rates are only required of the railroads when the things transported are "property of the United States."

Thus, in the case of the *Oregon-Washington Railroad & Navigation Co.* (255 U. S. 339, 345), affirming 54 C. Cls. 131, this court held that—

> "The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates."

The Court of Claims had made a ruling to the same effect in the prior case of the *Chicago, Milwaukee & St. Paul Railway Co.*, 50 C. Cls. 412, which decision was acquiesced in by the Government; but in the *Oregon-Washington R. R. & Nav. Co. Case*, above mentioned, the Government asked a reconsideration of said question by this court.

In a subsequent case of the *Oregon-Washington Railroad & Navigation Co.* (58 C. Cls. 645), which involved the transportation of the *authorized private mounts* of Army officers changing station, as well as of their household goods and personal effects, the Court of Claims said:

> "The property involved was in all instances the property of the individual and not of the United States, and it is now to be regarded as settled that

> such property is not in any sense to be regarded as property of the United States for transportation purposes within the provisions of the land-grant acts."

In the brief filed on behalf of the Government in this case it is stated that—

> "The Government does not contend that the United States is the absolute owner of the horses in question. It does contend that such horses are 'property' of the United States within the meaning of the land-grant statutes. The Government has a special property interest therein. It is well recognized that a bailee has many rights in the property which is the subject of bailment. The rights, of course, are determined and limited in accordance with the terms of such bailment."

The expression "property of the United States," as used in the railroad land-grant Acts, clearly means property *belonging to* the United States; *i. e.*, property to which the United States has title, as the owner thereof, and not property the title to and the possession of which is held by some one else, even though the United States has an interest in its transportation arising out of the fact that the owner of the property intends to use it partly, as in this case, or exclusively, for purposes of the Government.

That the United States must *own* the property transported in order to entitle it to land-grant rates, and a less interest therein is insufficient (although the property be transported by the carrier upon Government bills of lading at public expense and for a governmental purpose) was recognized by this court, as well as by both the litigating parties, in *Illinois Central Railroad Co. v. United States*, 265 U. S. 209, (affirming 57 C. Cls.

277,) which case involved the transportation of coal, stone and other articles for use in Government improvement of the Missouri River, and in which case the question of the title of the United States to the property transported was the only issue. This court, in that case, cited with approval the holding of the Court of Claims that land-grant rates were applicable by reason of the fact that "title to the property passed to the United States," beginning at initial point of shipment.

II.

All the Private Mounts of Army Officers, Whatever the Latter's Rank, Are Purchased and Owned Exclusively by Them, and the United States Has no Property Right Therein.—No Bailment of Such Mounts to the United States.

Both the Acts of Congress and the Army Regulations relating to the authorized private mounts of Army officers recognize the fact that *all* such mounts are owned *exclusively* by said officers.

The pertinent provisions of said Acts and Regulations are set forth on pages 3-9 of the Government's brief.

It will be noted therefrom that it is only in the case of an officer of the Army *below the grade of major*, required to be mounted—who "provides himself with suitable mounts *at his own expense*"—that Congress has authorized an addition to his pay on that account, no such allowance being made "for horses owned and actually kept" by officers of the rank of major and above, in the performance of their official military duties, and for which they are entitled to "forage in kind" under the provisions of the Act of

June 18, 1878, c. 263, sec. 8, set out on pages 3-4 of the Government's brief. It further appears from the same reference that a general is entitled to *own and keep* five such mounts, a lieutenant general four, a major general and brigadier general each three, and a colonel, lieutenant colonel and a major two such mounts.

It will also be noted that the provisions of the Acts of Congress cited by counsel for the Government invariably refer to all such mounts as the "*owned* horses" of the officers, or "as the authorized number of *owned* horses" of such officers.

Furthermore, paragraph 1273 of the Army Regulations of 1913, 1917, (p. 8 of the Government's brief), in referring to the mounts purchased by officers below the grade of major, at their own expense, expressly states that said mounts shall be "*of their exclusive ownership.*"

There is nothing in the record in this case to indicate whether the Army officers' private mounts here involved belonged to Army officers of the rank of major or above, or to Army officers below the rank of major.

The only condition in the Act of Congress of April 27, 1914, c. 72 (pp. 5-6 of the Government's brief), with reference to the additional pay to be received by an officer below the rank of major who purchases his own mounts, is that they shall be "suitable" mounts; to which condition paragraph 25 of the Army Regulations (cited on p. 7 of the Government's brief), in providing for their transportation at the expense of the United States, adds the requirement that they must be "intended to be used by him at his new station in the public service."

The provisions of Paragraph 1095 of the Army Regulations of 1913, 1917, as amended, (cited on p. 9 of the

Government's brief) have reference only to "horses held in the Quartermaster Corps unassigned, other than those at remount depots," which "may be sold to mounted officers on the authority of the department or division commander." The provision in that paragraph that the officer purchasing a horse under its provisions shall not be permitted to sell him, prior to the expiration of one year from the date of purchase from the Government, except to another officer at a price to be agreed upon between seller and buyer or back to the Government, etc., manifestly does not impair the title of the purchasing officer or make the horse the property of the United States, either within the meaning of the railroad land-grant laws or otherwise.

Neither the interest which the Government may have in an Army officer's use of his private mounts in the public service, nor the restriction on the sale of such a mount within one year if purchased from the Government under the provisions of Paragraph 1095 of the Army Regulations, nor the fact that in the case of officers below the rank of major the Government makes him an additional allowance if he purchases his own mounts—nor all of said matters—constitutes a bailment of such a mount to the Government, as contended for by counsel for the Government.

Bailment is defined by Bouvier as—

> "A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished."

and by Blackstone as—

> "A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall

be faithfully executed on the part of the bailee." (2 Bla. Com. 451.)

In the case of Army officers' private mounts, the essential feature of bailment is lacking, to wit, delivery of the horse into the possession and control of the Government. The most that the officer does is to agree to use his mount in the service of the Government, himself retaining absolute possession and control of the same, as well as absolute and exclusive ownership.

Nothing in the circumstances or in the Regulations prohibits the officer from using the mounts for his own private purposes, and it seems clear that it is for this reason that the law and Regulations do *not* require *ownership* of the horses by the Government.

III.

Land-Grant Privilege is Not to be Extended by Construction to Anything Not Property of the United States, Even Though the United States Has a Substantial Interest in Its Transportation.

The privilege of free or reduced rates for transportation of "property of the United States," secured to the Government by the railroad land-grant Acts, is not to be extended by construction to anything not actually "property of the United States." Manifestly, such provisions differ materially from the provisions of such Acts making grants of land to the railroads concerned. In the one case, Congress is conferring a benefit upon the grantee, while in the other case Congress is exacting something of value from the railroads in consideration for the land-grant.

There is nothing in the nature of the land-grant Acts which justifies the extension of said privilege to

the transportation of the household goods and personal effects, the private property of Army officers when changing station, or to the private mounts of such officers either within or in excess of their change of station allowance.

A clearer understanding of this matter may be had if the living conditions attending the residence of officers and enlisted men of the Regular Army at military posts be considered, together with the policy of the Government in respect thereto. We understand that a body of soldiers may occupy a military post continuously for two or three years, in time of peace, before they are moved to another post. But there is an important difference between the living conditions of the enlisted men at such military posts and the living conditions of the officers, as well as in the attitude of the Government in respect thereto. The enlisted men are housed in barracks and are not allowed, if married, to have their wives or families with them. Such men enlist only for comparatively short periods, and if they wish to live with their families they must leave the service when their period of enlistment expires or when they otherwise obtain their discharge. The officers of the Regular Army, however, are practically in the military service for life. Such being the case, the Government has no objection to the officers being married, but, on the contrary, provides them and their families, if any, with residences at military posts. When a regiment is moved from one military post to another the *enlisted men* have practically nothing but what they can carry on their persons which is not the property of the United States. Their arms, their uniforms and *their* mounts, (if the are mounted,) all belong to the United States. In the case of the officers

of the Regular Army, however, the situation is quite different. They usually, especially if married, have a considerable amount of household goods and other personal property, including their privately owned horses, to transport to their new station.

Under the circumstances stated it is but to be expected that when a body of soldiers is ordered to another military post the Government should transport, at its own expense, a certain weight of the household goods of such officers and also such of the officers' private mounts as are intended to be used by them in the public service. The interest of the Government in the welfare of such officers and their families, as well as the fact that such property may be used in the Government service, when required, may fully justify the Government in agreeing to defray the cost of such transportation. But whether the Government may, or may not, agree to bear such cost, should not be used as an argument to increase the burdens of the land-grant railroads. The fact remains at all times that said property is *not* "property of the United States," in any sense, and that such considerations do not justify the Government in imposing the whole or even a part of the cost of such transportation upon a land-grant railroad because of a provision in the act granting public lands to such railroad, to aid in its construction, requiring such railroad to transport troops and property of the United States free or at reduced rates.

As stated by Mr. Justice Brandeis in the *Union Pacific Railroad Co.* Case, 249 U. S. 354, 356-7 (Italics ours):

> "* * * All 'property' *of the Government*, whatever its character and intended use, is to be carried 'free of toll or other charge;' but of the many persons in its service, only 'troops.' "

So, the land-grant privileges would include all "troop property," such as their mounts, arms and other equipment furnished by and belonging to the United States, because such property would be property of the United States. But an Army officer's private mounts, like his personal baggage, is his own private property, and since this court has held that the personal baggage of an Army officer is not entitled to transportation at land-grant rates, although transported at the expense of the United States (*Oregon-Washington R. R. & Nav. Co. Case*, 255 U. S. 339, affirming 54 C. Cls. 131), it necessarily follows that the private mounts of an Army officer are likewise not entitled to transportation at land-grant rates, although transported at the expense of the Government.

IV.

Plaintiff and Other Railroads Have Consistently Maintained Their Right to Full Commercial Rates for the Transportation of Army Officers' Private Mounts, both Authorized and Unauthorized.

In their brief (pp. 11, 16), counsel for the Government refer to the fact that, as set up in paragraph VIII of the special findings of fact made by the Court of Claims (Record p. 15), "it has been the uniform practice of the administrative and accounting officers of the United States, following certain decisions of the former Comptrollers of the Treasury and of the Comptroller General of the United States, to pay the carriers from public funds the commercial rates, less the appropriate land-grant deductions required to be made from charges for the transportation of the authorized private mounts of Army officers when such mounts were

shipped on change of station orders of such officers."

Counsel for the Government omit, however, to quote the further finding of the Court of Claims which immediately follows the foregoing sentence, namely, that "*the correctness of this practice has been disputed by the plaintiff and its connecting carriers, and payments on such basis have been accepted by them under protest.*"

In other words, the right of the Government to land-grant deductions on the transportation of such private mounts has been a matter of dispute between the accounting officers of the Government and the plaintiff and its connecting carriers, ever since the practice referred to first began (which date does not appear).

It is furthermore to be remembered that the Court of Claims, in the case of the *Oregon-Washington R. R. & Nav. Co.*, 58 C. Cls. 645 (1923), held that the Government was not entitled to land-grant rates on the transportation of such private mounts, and that the Department of Justice declined to take an appeal to this court in that case; and this, notwithstanding there is no finding of the court, or assertion in the Government's brief, that the facts, or the law, are any different now from what they were at that time, unless it be that the amount of the present judgment, small as it is, may be a few dollars larger than the judgment in that case.

Nor can it be contended that there is any *principle* involved at this time, that was not involved at that time.

The case of *Emergency Fleet Corporation v. Western Union Telegraph Co.*, 275 U. S. 415, cited by counsel for the Government in support of their contention that "the land-grant statutes should be given a broad and liberal meaning in order to carry out the apparent

intent thereof," has no application. There, the question was whether the Emergency Fleet Corporation was to be regarded as one of the "departments of the United States" within the meaning of the Post Roads Act of July 24, 1866, c. 230, relating to the priority to be given by telegraph companies accepting the privileges of said Act to telegraphic communications between said departments and their officers and agents, at the prices to be fixed therefor by the Postmaster General. It was held that the Emergency Fleet Corportation was such a department of the United States, because, although a private corporation, it was organized by the United States Shipping Board, all of its capital stock was subscribed and paid for by the United States, and all of its business was in the Government's interest, etc. This conclusion was reached as a matter of *fact*, and not by any enlargement of the Post Roads Act by construction. It was also pointed out that the Western Union Telegraph Company had voluntarily extended such priority and the Government rate to a large number of similar organizations of the Government ever since it accepted the provisions of the Act of June 8, 1867, and it was held that "the construction given to the Act by the United States *and acquiesced in by the Western Union*, having been both contemporaneous and thereafter consistently and widely applied, is not only persuasive but, in our opinion, decisive of the case."

In the case at bar, Army officers' private mounts are the *personal property* of such officers and are used for their personal and private purposes, as well as in the service of the Government; plaintiff and its connecting carriers have always objected to the action of the Comptroller of the Treasury and of his successor

the Comptroller General in holding that the Government was entitled to land-grant rates on the transportation of such private mounts, and, furthermore, said holding was overruled by the Court of Claims in the case of the *Oregon-Washington R. R. & Nav. Co.*, 58 C. Cls. 645, and the Government at that time declined to appeal to this Court. In other words, we have here no contemporaneous and long-continued construction of the provision of the railroad land-grant Acts in question, acquiesced in by the railroads, but, on the contrary, a construction of said Acts by Government officers which began at an uncertain date, which has always been disputed and protested against by the railroads, and which was overruled several years ago by the Court of Claims without an appeal by the Government.

Besides, this case, we submit, comes within the principle of the decision of this court in the *Oregon-Washington Case* (255 U. S. 339), holding that "the personal baggage of an [Army] officer is not property of the United States and as such entitled to transportation at land-grant rates."

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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